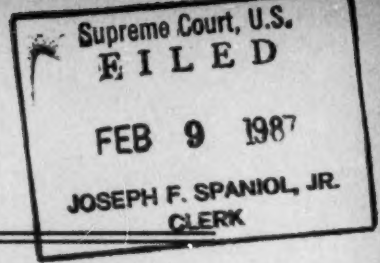


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No. 86-1077



In The
Supreme Court of the United States
October Term, 1986

— o —
BATTERY WORLD, INC., ET AL.,

Petitioners,

vs.

EXIDE CORPORATION,

Respondent.

— o —
**ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF OHIO**

— o —
**BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI**

— o —
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QUESTIONS PRESENTED

1. Whether the U.S. Supreme Court has jurisdiction pursuant to 28 U.S.C. Section 1257(3) when the petitioner failed to raise any federal constitutional claims in any state court proceeding.

2. Whether a state appellate court usurps the function of the jury in violation of the seventh amendment or deprives a party of property without due process of law in violation of the fourteenth amendment when it examines the record in order to rule on the denial of a party's motion for directed verdict and/or judgment notwithstanding the verdict.

3. Whether the seventh amendment applies to the states via the due process clause of the fourteenth amendment.

RULE 28.1 CORPORATE PARTY'S AFFILIATION

Apart from Respondent, Exide Corporation's wholly-owned subsidiaries, Respondent is a corporation which owns 100% of ESB International Corporation and ESB International Corporation owns 30% of Accumuladores Centroamericanos and 5.8% of Willard India, Ltd. Also, Respondent, Exide Corporation, directly owns 50% of Battronics, Inc. Otherwise, Respondent does not have any parent companies, subsidiaries or affiliates.

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REASONS FOR DENYING THE WRIT

I. The U.S. Supreme Court Lacks Jurisdiction To Hear A Case Under 28 U.S.C. Section 1257(3) When The Petitioner Never Made Any Federal Constitutional Claims In Any Of The State Court Proceedings.

In order for a petitioner to seek the jurisdiction of this Court pursuant to 28 U.S.C. Section 1257(3), the petitioner had to have raised its federal constitutional claims in the state court proceedings. Federal constitutional issues that were not presented to any lower court cannot be considered by this Court. *Tacon v. Arizona*, 410 U.S. 351, 352 (per curiam 1973); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969); *Hulbert v. Chicago*, 202 U.S. 275, 280 (1906). Battery World failed to make any constitutional claims in the state court proceedings and the state courts never passed upon any constitutional issues.

Rule 21.1(h) of the Supreme Court states:

If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised the method or manner of raising them and the way in which they were passed upon the court such pertinent quotation of specific portions of the record, or summary thereof, with specific references to the places in the record where the matter appears (e.g., ruling on exception, portion of court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari.

Where the portions of the record relied upon under this subparagraph are voluminous, they shall be included in the appendix referred to in subparagraph 1(k) of this Rule.

Battery World did not comply with Rule 21.1(h). This rule places the burden on Battery World to point out exactly where in the state court proceedings it presented its seventh and fourteenth amendment claims. Battery World's statement of the case is void of any references as to where it raised any federal questions in the state courts. Neither the Constitution nor any federal question was mentioned in the state court proceedings. Battery World must display in its statement of the case specifically where and when it first raised a federal question. Battery World has failed to meet this burden.

Battery World's sole argument in the state courts as to the right of a jury trial was that the Ohio Court of Appeals in this case abused its discretion by reversing the judgment of the trial court and entering final judgment in favor of Exide. Battery World argued that such a practice was inconsistent with *Ohio* law. Battery World's Argument and Proposition of Law before the Ohio Supreme Court reads as follows:

This case presents an issue of great public concern because as it stands now, the final judgment of the Eighth District Court of Appeals threatens our American system of jurisprudence. This Supreme Court of Ohio must grant Appellants' Motion to Certify because if left undisturbed, this case will establish a precedent which will permit a reviewing court to invade the province of the jury and substitute its own findings of fact for those facts found by the jury.

Proposition of Law:

Where a Court of Appeals reverses the jury verdict judgment of the trial court, substitutes its own findings of fact and renders final judgment in favor of Plaintiff Appellant, said court abuses its discretion and, at least, should remand such action to the trial court for further proceedings therein.

This Court will note that neither the seventh nor the fourteenth amendments of the Constitution are ever cited.

Since Battery World never presented any federal or constitutional claims in the state courts and since the state courts never made any rulings as to any federal or constitutional claims, Battery World is barred from presenting those arguments to this Court for the first time.

II. A State Appellate Court Neither Usurps the Function Of A Jury In Violation Of the Seventh Amendment Nor Deprives A Party Of Property Without Due Process Of Law In Violation Of The Fourteenth Amendment When It Examines The Record To Rule On The Denial Of A Party's Motion For Directed Verdict And/Or Judgment Notwithstanding The Verdict.

A court of appeals can examine the record and set aside a jury verdict as a matter of law when ruling on the denial of a party's motion for directed verdict and/or judgment notwithstanding the verdict. Such a practice in no way violates the seventh amendment, but is consistent with both Ohio and federal law.

During the trial, Exide made a Motion for Directed Verdict at the close of all the evidence. That motion was denied. When the jury returned a verdict for Battery World on its counterclaim and a verdict for Exide on its claim, Exide made a written Motion for Judgment Notwithstanding the Verdict or in the Alternative, a New Trial—both were denied. This formed the basis of Exide's appeal as is indicated by Exide's first Assignment of Error filed with the Ohio Appellate Court:

The trial court erred by allowing judgment on the jury verdict for Battery World's counterclaim against Exide when Battery World's alleged contract with Exide does not meet the formal requirements of the Ohio statute of frauds—Ohio Revised Code § 1302.04.

In the case of *O'Day v. Webb*, 29 Ohio St. 2d 215, 280 N.E. 2d 896, 897 (1972), the Ohio Supreme Court announced in Paragraph 3 of its syllabus:

A motion for directed verdict or a motion for judgment notwithstanding the verdict does not present factual issues, but a question of law, *even though in deciding such a motion, it is necessary to review and consider the evidence.* (emphasis added)

The Ohio Supreme Court reiterated this holding in *Ruta v. Breckenridge-Remy Co.*, 69 Ohio St. 2d 66, 430 N.E. 2d 935, 936 (1982). Therefore, Exide's appeal presented a question of law before the appellate court—the trial court's refusal to grant Exide's motion for directed verdict, new trial or judgment notwithstanding the verdict. In order to resolve this legal issue, the appellate court had to review and consider the evidence. As such, Appellate Rule 12(B) of the Ohio Rules of Court empowers the

Courts of Appeal to reverse trial court judgments involving matters of law.

Appellate Rule 12(B) reads as follows:

(B) Judgment as Matter of Law. When the court of appeals determines that the trial court committed no error prejudicial to the appellant in any of the particulars assigned and argued in appellant's brief and that the appellee is entitled to have the judgment or final order of the trial court affirmed as a matter of law, the court of appeals shall enter judgment accordingly when the court of appeals determines that the trial court committed error prejudicial to the appellant and that the appellant is entitled to have judgment or final order rendered in his favor as a matter of law, the court of appeals shall reverse the judgment or final order of the trial court and render the judgment or final order that the trial court should have rendered, or remand the cause to the court with instructions to render such judgment or final order. In all other cases where the court of appeals determines that the judgment or final order of the trial court should be modified as a matter of law it shall enter its judgment according.

In *Moncol v. Board of Education of North Royalton*, 55 Ohio St. 2d 72, 378 N.E. 2d 155 (1973), the court decided the issue of whether a court of appeals had authority to reverse and enter final judgment, rather than remand, on a case involving the denial of a motion for directed verdict. The Ohio Supreme Court held that an appellate court can reverse and enter final judgment in such a case. *Id.* at 78, 378 N.E. 2d at 159. The Ohio Supreme Court made a distinction between reversals of jury verdicts and motions for directed verdicts.

Appellants assert further that the Court of Appeals was without authority to reverse and enter a final

judgment as it did, and should have remanded the cause for further proceedings. The Appellants rely upon App. R. 12 which was interpreted in part in *Hanna v. Wagner*, (1974) 39 Ohio St. 2d 64. This court stated in *Hanna, supra*, that in a jury case the Court of Appeals may not enter final judgment on the weight of the evidence but must remand the cause for a new trial. However, *Hanna* deals with the reversal of a jury verdict, whereas the instant cause deals with the reversal of a denial of a motion for a directed verdict. The Court of Appeals herein was explicit when it stated, "[b]ecause of the foregoing, the trial court committed error in overruling . . . [defendants'] motion for a directed verdict at the close of . . . [plaintiffs'] case and the close of all the evidence." *Hanna* does not control the present appeal, but, rather, App., R. 12(B) controls . . . *Id.* at 77-78, 278 N.E.2d at 159.

The Ohio Appellate Court in this case ruled that Exide was entitled to final judgment via reversal. There was no violation of the seventh amendment, for the state appellate court did not usurp the function of the jury, but rather, exercised its power to rule on denials of a party's motion for directed verdict and/or judgment notwithstanding the verdict.

The U.S. Supreme Court in *Neely v. Martin K. Eby Construction* 886 U.S. 317, 321-22 (1967), *rehearing denied* 386 U.S. 1027 (1967), decided the issue of whether a federal appellate court could, after reversing the denial of a defendant's Rule 50(b) motion for judgment notwithstanding the verdict, order dismissal or direct entry of judgment for defendant. The Court held that it was proper for the appellate court to enter final judgment stating:

As far as the Seventh Amendment's right to jury trial is concerned, there is no greater restriction on the

province of the jury when an appellate court enters judgment n.o.v. than when a trial court does; consequently, there is no constitutional bar to an appellate court granting judgment n.o.v. See *Baltimore & Carolina Line, Inc. v. Redman*, supra. [295 U.S. 654 (1935)] Likewise, the statutory grant of appellate jurisdiction to the courts of appeals is certainly broad enough to include the power to direct entry of judgment n.o.v. on appeal. Section 2106 of Title 28 provides that,

“The Supreme Court or any other Court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.” See *Bryan v. United States*, 338 U.S. 552.

Id. at 322.

Thus, the Supreme Court concluded that it is proper and necessary for appellate courts to review evidence when ruling on the denial of a party's motion for judgment notwithstanding the verdict. Should the appellate court reverse the denial of the motion, it has the power to dismiss or enter final judgment. There was, therefore, no seventh amendment violation by the Ohio Appellate Court in this case.

Moreover, since the Ohio Appellate Court acted consistent with its authority, there was absolutely no deprivation of Battery World's property without due process of law as stated in Battery World's fourth argument which reads:

An Appellate Court which reexamines the record makes its own findings of fact and reverses and renders judgment thereon deprives the litigant of property without due process of law in violation of the Fourteenth Amendment.

The Ohio Appellate Court had to review the evidence in order to rule on the denial of Exide's Motion of Directed Verdict and/or Judgment Notwithstanding the Verdict. Ohio law mandates such appellate review of the facts in such situation, *See, e.g., O'Day v. Webb*, 29 Ohio St. 2d 215, 280 N.E. 2d 896, 897 (1972), and this Supreme Court has also upheld this practice in *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317, 321-22 (1967), *rehearing denied*, 386 U.S. 1027 (1967). Though Battery World was deprived of its property because of the appellate court's reversal in favor of Exide, the process was done in strict compliance with due process of law as required by the fourteenth amendment.

III. The Seventh Amendment To The U.S. Constitution Does Not Apply To The States Via The Due Process Clause Of The Fourteenth Amendment.

The seventh amendment does not apply to state court proceeding through the due process clause of the fourteenth amendment. *Fay v. New York*, 332 U.S. 261, 288 (1947); *Walker v. Sauvinet*, 92 U.S. 90, 92 (1875). The Court in *Walker* stated:

The States, so far as this amendment [seventh amendment] is concerned, are left to regulate trials in their own courts in their own way. A trial by jury in suits at common law pending in the State courts is not, therefore, a privilege or immunity of national citizenship,

which the States are forbidden by the fourteenth amendment to abridge.

Id. at 92.

A federal district court in *Melancon v. McKeithen*, 345 F.Supp. 1025 (E.D. La 1972), *aff'd* *Mayers v. Ellis*, 409 U.S. 943 (1972); *Hill v. McKeithen*, 409 U.S. 943 (1972); *Davis v. Edwards*, 409 U.S. 1098 (1972), was faced with the issue of whether the mandates of the seventh amendment apply to the states. That court held:

This leads us to consider whether jury trial without re-examination of facts—the principle embodied in the second clause of the Seventh Amendment—is so fundamental to the American scheme of justice as to constitute a necessary ingredient of due process. We hold, in view of the ever-changing nature of the judge-jury division of functions, that the principle embodied in the second clause of the Seventh Amendment is not required of the States by due process.

Id. at 1045.

That district court went on to explain what it meant by the “ever-changing nature of the judge-jury division of functions” by citing to the Federal Rules of Civil Procedure as an example. The court stated that certain provisions of the Federal Civil Rules diminish the rule of the jury as finder of fact. In particular, the court stated:

So too, when a trial court grants a motion for judgment notwithstanding the verdict, under Rule 50(b), on the basis of insufficiency of the evidence (see *Montgomery Ward & Co. v. Duncan*), [311 U.S. 243 (1940)], it must necessarily involve re-examination of facts despite the “legal” nature of the question presented. Further, when an appellate court grants a motion for judgment notwithstanding the verdict after a jury trial (see *Neely v. Martin K. Eby Construction*

Co., 1967, 386 U.S. 317, 87 S. Ct. 1072, 18 L.Ed. 2d 75) it is technically issuing a delayed ruling on a motion for directed verdict yet the ruling must necessarily involve fact examination.

Id. at 1046.

Thus, the district court's rationale for not applying the seventh amendment to the states, i.e., the "ever-changing nature of the judge-jury division of functions" as evidenced by the Federal Rules of Civil Procedure, supports Exide's second argument which it made to this Court that appellate courts do not violate the seventh amendment when reexamining facts in order to rule on the denial of a party's motion for directed verdict and/or judgment notwithstanding the verdict.

There is no need to re-argue the issue of whether or not the seventh amendment applies to the states. This Court on numerous occasions has held the seventh amendment does not apply to the states. Battery World's arguments to the contrary are void of merit.

CONCLUSION

This Court should deny Battery World's petition for writ of certiorari for three reasons. First, Battery World never argued any federal questions or constitutional issue in the state courts. Second, both the Ohio Supreme Court and this U.S. Supreme Court have ruled that appellate courts can examine facts and enter final judgment when ruling on the denial of a party's motion for directed verdict and/or judgment notwithstanding the verdict. Third,

this Court has already determined that the seventh amendment does not apply to the states.

Therefore, for all the foregoing reasons, Battery World's petition for writ of certiorari should be denied.

Respectfully submitted,

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